

it clear by words and acts, that he had waived the breach, the effect of which is that he had preserved the status quo.

Was the respondent himself in breach by not completing the work in time? It is quite obvious that time was not of the essence of the contract. No inference can be drawn that time was of the essence. See *Haji Hassan v. Tan Ah Kian*.⁽⁶⁾ The appellants thought fit that the respondent was in breach, so they terminated the agreement by their letter of November 26, 1969, which was followed by another letter of December 16, 1969. The respondent pleaded for leniency too late (see his letter of January 6, 1970 indicating willingness to continue work). The appellants replied "there is no turning back." That was the coup de grace.

In the course of the argument it was submitted on behalf of the respondent that if we allow the appeal we should also consider the respondent's claim for work done based on quantum meruit. The trial judge has thought fit not to express any opinion on the matter as he has held that the claim of fraud was substantiated. I now proceed to consider this aspect of the claim.

It is axiomatic that one of the conditions to justify a claim based on quantum meruit is that the plaintiff must not be at fault. This is what the learned author of *Anson's Law of Contract*, 23rd Edn., says at page 529:

"Secondly, the claim must be brought by the party not in default. The party who breaks the contract, even though he may have partially performed some part of his obligation, is not entitled to a quantum meruit for the work which he has done."

It will be sufficient to add one short passage from the well known case of *Roberts v. The Bury Improvement Commissioners*.⁽⁷⁾ That was also a case of a building contract. Blackburn J. says:

"It is a principle very well established at common law, that no person can take advantage of the non-fulfilment of a condition the performance of which has been hindered by himself; see *Com. Dig. Condition (L)*; and also that he cannot sue for a breach of contract occasioned by his own breach of contract, so that any damage he would otherwise have been entitled to for the breach of the contract to him would immediately be recoverable back as damages arising from his own breach of contract."

That in my opinion is sufficient to dispose of the claim on quantum meruit against the respondent.

I now come to the appeal on the counterclaim. The trial judge was not able to rely on the evidence adduced by the appellants. He has rejected the evidence of all the witnesses examined by them to prove the fact of deposit and compensation. He further held that the alleged agreements of sale and purchase were not in existence before 1969, otherwise some mention of it would be made in the exchange of letters between the parties in 1969 or early 1970. That conclusion has been criticised. It is said that this finding is not relevant to the issue whether the respondent was liable to pay special damages. Another criticism levelled against the finding of the trial judge was that he had considered matters that were never pleaded. Counsel insisted that beyond flatly denying knowledge of or liability under the two agreements, the appellants did not plead that those agreements were fabricated and

A not in existence or entered into by them on the two dates.

Now in paragraph 5 of the reply and defence to the counterclaim, the respondent says that he

"does not admit and has no knowledge whatsoever of the alleged two agreements mentioned in the counterclaim until receipt of the defence and counterclaim."

B In the face of this averment it cannot be denied that they had pleaded that the agreements were not in existence on those two dates and therefore were a sham. The trial judge doubted the genuineness of the date of execution of the two agreements. That in my opinion is a relevant factor in determining whether the agreements were a sham and consequently whether special damages were proved. A reasonable and prudent man would have mentioned it in the exchange of letters bringing notice to the respondent to complete the contract in time because they had committed themselves to sell the remaining two terrace houses to third parties. In the matter of assessing oral evidence this court as a general rule attaches great value to the opinion formed by the trial judge unless there are special reasons for not doing so. On an assessment of the entire evidence in the case I am in complete agreement with the trial judge that the counterclaim has not been satisfactorily proved.

I would therefore allow the appeal and dismiss the appeal on the counterclaim.

E I think with regard to the appeal it must be allowed with costs here and in the court below. Similarly with regard to the counterclaim it must be dismissed with costs here and in the court below.

Azmi L.P. and Ismail Khan C.J. (Borneo) concurred.

F *Appeal allowed.*

WOON HOE KAN & SONS SDN. BHD. v. BANDAR RAYA DEVELOPMENTS BHD.

[F.C. (Ong C.J., Ali and Ong Hock Sim F.JJ.)

October 31, 1973]

[Kuala Lumpur — Federal Court Civil Appeal
No. 111 of 1972]

H — *Contract — Overdue payment — Interest — Rate of — Contracts (Malay States) Ordinance, 1950, s. 74.*

This was an appeal against the decision of the High Court ([1973] 1 M.L.J. 60). The appellants had contracted to carry out certain civil engineering works for the respondents and a sum of \$1,190,165.17 was certified as due to them, out of which part payment of \$330,000 had been made. There was evidence of the appellant's forbearance to sue for a considerable time in consideration of an agreement to pay interest on overdue payments.

I The appellants brought an action to recover the amount due and were given leave to sign final judgment for \$860,165.17. Leave to defend was granted as to the claim for interest at the rate of 10.8% and the learned trial judge eventually allowed the claim at 5%. The appellant appealed.

Held, allowing the appeal: on the evidence the parties had agreed on the rate of interest and therefore the order should be for payment at the agreed rate, that is, 10.8% per annum.

FEDERAL COURT.

Edgar Joseph Jr. for the appellants.*V. C. George* for the respondents.

Ong C.J.: The issue raised in this appeal and cross-appeal is a simple one. The appellants contracted to carry out certain civil engineering works for the respondents who are property developers. Payments therefor were to be made within 14 days from the delivery of certificates issued from time to time by the engineers appointed by the respondents. Between February 1969 and November 1970 a total sum of \$1,190,165.17 was certified as due and payable pursuant to the agreements between the parties. Part payment only to the extent of \$330,000 had been made, and judgment in this action was duly entered against the respondents for the balance of \$860,165.17. Leave to defend was granted as to the claim for interest — at the rate of 10.8 per cent. per annum — which the respondents disputed. The trial judge allowed the claim, at the rate of 5 per cent. simple interest on all sums certified due but not paid within 14 days thereafter.

In this appeal the appellants contend that interest at 10.8 per cent. should have been awarded, or some other reasonable rate above 5 per cent. The respondents' contention is that, upon his finding of fact that no definite rate of interest had been agreed upon, the learned trial judge was in error by awarding interest at 5 per cent. by virtue of illustration (n) of section 74 of the Contracts (Malay States) Ordinance 1950, whereby the appellants were not entitled to any interest whatsoever.

In my view there clearly was evidence of the appellants' forbearance to sue upon the certificates for a considerable time — such forbearance being in consideration of "an agreement to pay interest on overdue payments". The learned trial judge had found as a fact that the respondents admitted liability to pay interest, but that no specific agreement had been reached as to the rate of interest to be charged. In the absence of such agreement, therefore, he was of the opinion that the appellants were only entitled to a reasonable rate — namely 5 per cent., being the income they would have had by the use of their moneys if paid on time — because they were under no obligation to finance the respondents' property development and were entitled to stop all further work when progress payments remained unpaid by the respondents in breach of contract.

With respect, I think there was evidence on the record to justify the inference that the respondents' managing director did agree to reimburse the appellants the interest payments they had to make on their bank overdraft and their loan from the Finance Company. The specific rate certainly appears to have been agreed — and in writing by the letters of April 22, 1969 and December 31, 1969. The debit notes claiming interest at such stated rate were never challenged or disputed. In the circumstances, I am of opinion that the learned judge ought not to have substituted for the agreed rate of interest another rate based simply on what the unpaid moneys would have earned as income — upon which no evidence at all was offered as to prevailing rates of interest payable by banks or

A finance companies on fixed deposits. Since the intent of the parties was to indemnify the appellants at the agreed rate of 0.9 per cent. per month or 10.8 per cent. per annum, then it seems to me that no other rate can be substituted in the exercise of the court's discretion.

B I would therefore allow the appeal, and dismiss the cross-appeal, with costs. The order of the court below will be varied by substituting for 5 per cent. the higher rate of 10.8 per cent. per annum, but, in the circumstances, without monthly rests, to be determined (failing agreement between the parties) on enquiry by the Senior Assistant Registrar, following the directions given by the trial judge that each payment to account be considered as payment towards the certificates in successive order of time and the interest calculated on each certificate from the date due for payment thereof. For saving time and costs, it is hoped that the parties will be able to agree on a reasonable figure by way of an amicable settlement.

C **Ali and Ong Hock Sim FJJ.** concurred.

D

Appeal allowed.

Solicitors: *Joseph & Son; Ng Ek Teong & Partners.*

E

C. MOHAMMAD v. PUBLIC PROSECUTOR

[A.Cr.J. (Syed Agil Barakbah J.) October 31, 1973]

[Alor Star — Criminal Appeal No. 18 of 1973]

F *Price Control Act, 1946 (Act 121) — Charge of failure to affix labels to goods — No order requiring retailers to affix such labels — Price Control (Indication of Grade and Prices) Order, 1967.*

Criminal Law and Procedure — Charge — Defective — Criminal Procedure Code (F.M.S. Cap. 6), ss. 156, 325(i) & 422.

G In this case the appellant had been convicted on a charge of failing to affix labels or tags indicating the grades and prices of textiles. It was argued that the charge on which the accused was convicted was defective as there was no order under the Price Control Ordinance requiring retailers to affix tags or labels to any goods or classes of goods.

H **Held:** as the charge in this case was defective the conviction must be quashed.

Cases referred to:-

(1) *Tan Cheng Kooi & Anor. v. Public Prosecutor* [1972] 2 M.L.J. 115 at p. 116.

(2) *Lee Swee Tee v. Public Prosecutor* [1960] M.L.J. 161.

CRIMINAL APPEAL.

Karpal Singh for the appellant.

Yap Cheng Boon (Deputy Public Prosecutor) for the respondent.

I

Syed Agil Barakbah J. (delivering oral judgment): This is an appeal against the decision of the learned President of the Sessions Court who convicted the appellant for "failing to affix labels or tags indicating the grades and prices to the following articles offered for sale", to wit, textiles under section 22(1) of the Price Control Ordinance, No. 26 of 1946. The appellant was sentenced to a fine of \$2,000 in default